SEMATAN SHRIMP HATCHERY COMPANY *a*

v.

AQUA FRESH COMPANY

HIGH COURT SABAH & SARAWAK, KUCHING
LAU BEE LAN J
[CIVIL APPEAL NO: 12-30-03-III(II)]
29 AUGUST 2005 *b*

CIVIL PROCEDURE: *Appeal - Record of appeal - Appellant omitted to file in plaintiff's reply - Whether pleadings incomplete - Non compliance with O.49 r.6(3)(b) of the Subordinate Courts Rules 1980 - Whether there was no proper record of appeal for court to consider* *c*

CIVIL PROCEDURE: *Appeal - Record of appeal - Supplementary record of appeal - Failure to make application for extension of time - Subordinate Courts Rules 1980, O. 3 r. 5 - Whether complied with* *d*

This was an appeal to a judge in chambers by the appellant/third party ('appellant') against the decision of the sessions court judge made on 22 August 2003 *vide* a notice of appeal dated 3 September 2003 made pursuant to O. 49 r. 6 of Subordinate Courts Rules 1980 ('the SCR') (encl. 2). The counsel for the appellant had, *inter alia,* tendered the outline submission of the appellant dated 10 September 2004 (encl. 20). Attached to the outline submission of the appellant was the supplementary record of appeal which comprised the plaintiff's reply dated 29 April 2002 and which was required to be included in the record of appeal filed on 19 September 2003 (encl. 6). The counsel for the respondent/plaintiff ('respondent') raised a preliminary objection to the manner in which the supplementary record of appeal was tendered by the appellant on the following grounds: (a) there was no proper record of appeal before the court and (b) the supplementary record of appeal was tendered without leave of the court, and without an application for extension of time made to file the supplementary record of appeal and by annexing the same to the outline submission of the appellant was an abuse of the court process. *e* *f* *g*

Held (allowing the respondent's preliminary objection):

[1] Following the provision of O. 49 r. 6(3) of the SCR, it was incumbent on the appellant to ensure that his record of appeal shall contain, *inter alia,* all pleadings filed within three weeks after the filing of the notice of appeal. Here, the appellant had omitted to file in the plaintiff's reply in the said record of appeal (encl. 6) and therefore the pleadings were incomplete. There was no proper record of appeal for the court to consider as there was non-compliance with O. 49 r. 6(3)(b) of the SCR. (pp 508 d-i & 509 e-f) *h* *i*

[2] The appellant was obliged to file in his application for extension of time to file in the supplementary record of appeal before the court could exercise its discretion whether to grant the application or otherwise in the context of O. 1A and O. 2 r. 3 of the SCR. If the court were to consider the merits of the supplementary record of appeal without a prior proper application being made under O. 3 r. 5 of the SCR, it would be an abuse of the court's process. As the appellant herein had not made any application under O. 3 r. 5 of the SCR for extension of time to file in the supplementary record of appeal, there was nothing for the court to consider and since therefore there was no proper record of appeal before the court, the preliminary objection of the respondent was allowed. (p 510 e-g)

Case(s) referred to:

Arab-Malaysian Finance Bhd v. Mohd Zakaria Salim [2002] 2 CLJ 530 CA ***(refd)***

Bank Utama (Malaysia) Bhd v. Rindaya Sdn Bhd & Ors (Suit No: 22-86-2000-II) (Unreported) ***(refd)***

Beauford Baru Sdn Bhd v. Gopala Krishnan VK Gopalan [2002] 3 CLJ 686 HC ***(refd)***

Hardial Singh Sekhon v. Talam Leasing Sdn Bhd [2001] 3 CLJ 557 CA ***(refd)***

Hock Seng Construction Sdn Bhd & Anor v. Yeoh Poh Owi & Anor [2001] 4 CLJ 1 CA ***(refd)***

Hock Seng Construction Sdn Bhd & Anor v. Yong Kon Fatt & Anor [2001] 3 CLJ 561 CA ***(refd)***

Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor [1997] 3 CLJ 305 FC ***(refd)***

Looi Wan Teik v. Dijaya Enterprise Bhd [2001] 6 CLJ 124 HC ***(refd)***

Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra Malaysia Bhd [2001] 1 CLJ 391 CA ***(refd)***

Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 CA ***(refd)***

Nicholls v. Nicholls [1997] 2 All ER 97 ***(refd)***

United Malayan Banking Corp Bhd v. Ernest Cheong Yong Yin [2001] 2 CLJ 31 CA ***(refd)***

Legislation referred to:

Subordinate Courts Rules 1980, O. 1A, O. 2 r. 3, O. 3 r. 5, O. 49 r. 6(3)(b)

For the appellant/3rd party - Dominque Ng; M/s Dominique & Assoc
For the respondent/plaintiff - KC Wong; M/s KC Wong & Assoc

Reported by Suhainah Wahiduddin

JUDGMENT

Lau Bee Lan J:

This is an appeal to a judge in chambers by the appellant/third party (the "appellant") against the decision of the learned Sessions Court Judge made on 22 August 2003 *vide* a notice of appeal dated 3 September 2003 made pursuant to O. 49 r. 6 of Subordinate Courts Rules 1980 (the "SCR") (encl. 2). Learned counsel for the appellant, Mr. Dominique Ng had, *inter alia*, tendered the outline submission of appellant dated 10 September 2004 (encl. 20). Attached to the outline submission of the appellant is the Supplementary Record of Appeal which comprised the plaintiff's reply dated 29 April 2002, pp. 61-63 which Mr. Ng informed the court is an integral part of the pleadings and is required to be included in the record of appeal filed on 19 September 2003, pp. 1-60 (encl. 6).

Mr. KC Wong, the learned counsel for the respondent/plaintiff (the "respondent") raised a preliminary objection to the manner in which the Supplementary Record of Appeal was tendered by the appellant on the following grounds:

(a) There is no proper record of appeal before the court and cited the cases of *Megat Najmuddin Dato Seri (Dr.) Megat Khas v. Bank Bumiputra Malaysia Bhd* [2001] 1 CLJ 391, *Hock Seng Construction Sdn Bhd & Anor. v. Yeoh Poh Owi & Anor* [2001] 4 CLJ 1 and *Hardial Singh Sekhon v. Talam Leasing Sdn Bhd* [2001] 3 CLJ 557.

(b) The Supplementary Record of Appeal was tendered without leave of the court and without an application for extension of time made to file the Supplementary Record of Appeal and by annexing the same to the outline submission of the appellant is an abuse of the court process. The cases cited in support were *Looi Wan Teik v. Dijaya Enterprise Bhd* [2001] 6 CLJ 124, *Hock Seng Construction Sdn Bhd & Anor v. Yong Kon Fatt & Anor* [2001] 3 CLJ 561 and *Hock Seng Construction Sdn Bhd & Anor. v. Yeoh Poh Owi & Anor (supra).*

The appellant on the other hand submitted that the preliminary objection should be dismissed on the following grounds:

(a) The Supplementary Record of Appeal has a separate title although annexed to the outline submission of the appellant.

(b) There is no prejudice caused to the respondent by annexing the Supplementary Record of Appeal containing the plaintiff's reply to the outline submission of the appellant because the said document is the plaintiff's own pleading.

(c) The omission to file the plaintiff's reply as part of the pleading in the Record of Appeal (encl. 6) was inadvertent as the counsel for the appellant was only acting for the appellant/third party and therefore can only obtain the plaintiff's reply from the defendant.

In support, the cases of *Arab-Malaysian Finance Berhad v. Mohd Zakaria bin Salim* [2002] 2 CLJ 530, *Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor* [1997] 3 CLJ 305 and *Nicholls v. Nicholls* [1997] 2 All ER 97.

Order 49 r. 6(3) of the SCR states:

> (3) Within three weeks after the filing of the notice of appeal, the appellant shall file the record of appeal in the High Court, and the record shall contain copies of:
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> (a) the application for the decision;
>
> **(b) all pleadings filed;**
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> (c) all affidavits filed in support of or in opposition to the application; and
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> (d) the order or draft order of the decision appealed from:
>
> Provided that the record of appeal shall not include the notes of evidence, the grounds of judgment or any memorandum of appeal. (emphasis added)

Following the abovesaid provision, it is incumbent on the appellant to ensure that his record of appeal shall contain, *inter alia*, all pleadings filed within three weeks after the filing of the notice of appeal. In this instant case, the appellant had filed the record of appeal (encl. 6) on 19 September 2003 which is within the time limit provided under O. 49 r. 6(3) of the SCR. However, as admitted by Mr. Ng, he had omitted to file in the plaintiff's reply in the said record of appeal and therefore the pleadings were incomplete. Mr. Ng had attempted to file the supplementary record of appeal containing the plaintiff's reply by annexing to the outline submission of the appellant during the hearing of the appeal proper on 10 September 2004. There is no attempt by the appellant to file in an application for extension of time to file in the supplementary record of appeal which was attempted to be filed in the manner stated only on 10 September 2004 which is about a year later after the filing of the record of appeal. Mr. Ng merely explained that the omission was inadvertently made and as he was acting for the appellant/third party, he had to procure the plaintiff's reply from the defendant.

Order 3 r. 5 of the SCR states:

> (1) The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by these rules, or by any judgment, order or direction, to do any act in any proceedings.
>
> (2) The Court may extend any such period as is referred to in paragraph (1) although the application for extension is not made until after the expiration of that period.

In this case as I have stated the appellant did not make any application pursuant to O. 3 r. 5 of the SCR, not even an oral application for that matter. Since the appellant has not complied with this provision, how then is this court going to consider whether there is any merit in the supplementary record of appeal and the appeal proper. The need to apply for an extension of time in this case for the appellant to file in the supplementary record of appeal is borne out by the cases cited by the respondent *Looi Wan Teik v. Dijaya Enterprise Bhd* [2001] 6 CLJ 124, *Hock Seng Construction Sdn Bhd & Anor v. Yong Kon Fatt & Anor* [2001] 3 CLJ 561 *(supra)* and *Hock Seng Construction Sdn Bhd & Anor. v. Yeoh Poh Owi & Anor (supra)* and *United Malayan Banking Corp Bhd v. Ernest Cheong Yong Yin* [2001] 2 CLJ 31.

Since there is a failure by the appellant to comply with O. 3 r. 5 of the SCR, it is improper for the court to consider the supplementary record of appeal which the appellant is seeking to tender as to do so would tantamount to an abuse of the court process. In addition, there is no proper record of appeal for the court to consider as there is non compliance with O. 49 r. 6(3)(b) of the SCR since all pleadings have not been filed. On this ground alone, I am of the view that the preliminary objection of the respondent should be allowed with costs to be taxed unless otherwise agreed.

It is improper for the court to accept the explanation of Mr. Ng with regard to the omission in filing the supplementary record of appeal earlier because that statement is a statement from the Bar and it is inadmissible. His Lordship Gopal Sri Ram in *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609 opined:

> The only reference to the delay point is to be found in the address of counsel for the respondent in the court below and the explanation is in reality that of counsel and not of his client under oath. It is a principle fundamental to our system of adversarial litigation that evidence upon a matter must be given on oath. The practice of counsel giving evidence from the Bar, as was done in this case, is to be deprecated.

I observed that the cases cited by both the learned counsel were cases decided prior to the introduction of the amendment to O. 1A and O. 2 r. 3 of the SCR which was promulgated *vide* P.U(A) 253/03 and which came into force on 18 July 2003. As O. 1A and O. 2 r. 3 of the SCR is in *para materia* with O. 1A and O. 2 r. 3 of the Rules of the High Court (the "RHC"), it would be appropriate to refer to the case of *Beauford Baru Sdn Bhd v. Gopala Krishnan VK Gopalan* [2002] 3 CLJ 686 regarding the approach taken by the court pertaining to preliminary objection raised in connection with technical non-compliance of the RHC. In this connection, I wish to refer to my judgment in *Bank Utama (Malaysia) Berhad v. Rindaya Sdn Bhd & 2 Ors* dated 25 April 2005 (High Court Kuching Suit No. 22-86-2000-II-unreported) where I had discussed the case of *Beauford Baru Sdn Bhd (supra)* and *United Malayan Banking Corp Bhd (supra).*

It is clear that even after the amendment of O. 1A and O. 2 r. 3 of the RHC and the equivalent provision under the SCR, it is my view that the position has not changed. In *Beauford Baru Sdn Bhd (supra)* and *Bank Utama (Malaysia) Berhad (supra)* there was an application made for extension of time to file a notice of appeal in the former case and an extension of time to file and serve an affidavit in opposition in the latter case.

In the light of what is stated above, I am of the view that even after the introduction of the amendment of O. 1A and O. 2 r. 3 of the SCR, before the court can consider the merits of the appeal, the appellant is obliged to file in his application for extension of time to file in the supplementary record of appeal before the court can exercise its discretion whether to grant the application or otherwise in the context of O. 1A and O. 2 r. 3 of the SCR. If the court is to consider the merits of the supplementary record of appeal without a prior proper application being made under O. 3 r. 5 of the SCR, it would be in my view again an abuse of the court's process. In the circumstances as the appellant has not made any application under O. 3 r. 5 of the SCR for extension of time to file in the supplementary record of appeal, there is nothing for the court to consider and since therefore there is no proper record of appeal before the court, I allow the preliminary objection of the respondent with costs to be taxed unless otherwise agreed.